

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FSH:LI:TL-N-3019-01
HNAdams

date: May 18, 2001

to: Brenda Wilkerson, Revenue Agent, LMSB Division Group 1518

from: Associate Area Counsel (Financial Services & Healthcare)
CC:LM:FSH:LI

subject: [REDACTED]

U.I.L. No. 6501.08-00

This memorandum responds to your May 9, 2001 request for assistance. This memorandum should not be cited as precedent.

FACTS

The facts, as we understand them, are as follows:

You want to obtain a valid extension of the assessment statute for the taxpayer's [REDACTED] year. The taxpayer is a [REDACTED] year old minor who resides in New York. She is a shareholder of [REDACTED] [REDACTED] is an S corporation that is not subject to the TEFRA procedures for [REDACTED]. The taxpayer will not turn [REDACTED] until shortly after the statute would expire on [REDACTED] in the absence of a valid consent.

ISSUE

Who can sign a Form 872 to extend the period provided by Code section 6501 within which the Service must assess and collect tax due from the taxpayer?

CONCLUSION

The Service should not rely on the validity of a consent executed by or on behalf of a minor who resides in New York. It is unclear that New York law grants anyone the right to enter into a consent that would bind a minor. If the Service wants to ensure its ability to assess a deficiency against a minor, we recommend that it issue a statutory notice of deficiency before the statute of limitations provided by Code section 6501 expires without regard to any extension by agreement.

11287

DISCUSSION

The Code and treasury regulations do not provide who may sign consents under Code section 6501(c)(4) on behalf of minors, and we are unaware of any general federal statute dealing with the competency of minors. Rev. Rul. 83-41, 1983-1 C.B. 349 addresses who may sign consents in a number of circumstances, none of which involves a minor. It provides that the Service generally will look to and apply the rules applicable to the execution of the original returns to determine who may sign consents. We do not believe that the guidance contained in Rev. Rul. 83-41 can safely be extended to returns of minors.

The Code and Treasury regulations provide the rules applicable to who may execute returns of minors. Code section 6061 provides any return, statement or other document required to be made shall be signed in accordance with forms or regulations prescribed by the Secretary. The Secretary has determined that a minor is responsible for making his own tax return; however, if the minor is unable to make a return due to age or other reason, the parent or guardian must make and sign the return. Treas. Reg. §§ 1.6012-1(a)(4) and 1.6012-3(b)(3); Rev. Rul. 82-206, 1982-2 CB 356. Those rules would suggest that either a minor or the minor's parent or guardian may sign consents on behalf of the minor, but we believe that the Service could not rely on such a consent being valid with respect to minors who reside in New York.

A consent to extend the period for assessment is essentially a unilateral waiver of the taxpayer's defense and it is not a contract. Strange v. United States, 282 U.S. 270 (1931); Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). Contract principles are significant, however, because Code section 6501(c)(4) requires that the parties reach a written agreement as to the extension. The term "agreement" means a manifestation of mutual assent. Piarulle v. Commissioner, *supra* at 1042 (citing S. Williston, Contracts 6 (3d ed. 1957)). We accordingly believe that a court evaluating the validity of a consent executed by or on behalf of the minor might look to New York contract law to determine the validity of the consent.¹

¹ This conclusion is consistent with the conclusion reached in a June 4, 1987 memorandum from Chief, Branch 3, General Litigation Division to Regional Counsel, Southeast Region. The memorandum concludes that who should sign a consent for a minor should be determined under state law. A summary of the memorandum was published in General Litigation Bulletin No. 321 (June 1987), which is available on LEXIS at 1987 GLB LEXIS 7.

For purposes of New York contract law, a person is a minor until they reach 18 years of age.² Under New York common law, contracts entered into by minors are generally voidable at their election. See Shields v. Gross, 461 N.Y.S.2d 254, 257 (Ct. App. 1983); 66 NY Jur 2d, Infants § 7 note 67 and accompanying text. The New York State legislature has created exceptions to the common law rule that, in certain circumstances, either abrogate minors' common law right to void contracts or confer upon minors the right to make binding contracts. See, e.g., N.Y. Gen. Oblig. Law §§ 3-101, 3-102, and 3-103 (Consol. 2001); Shields v. Gross, *supra*. However, we have been unable to identify an exception that we believe would clearly apply to prevent an individual from voiding a consent executed during their minority. We accordingly believe that the Service should not rely on the validity of a consent signed by a minor who resides in New York.

We similarly do not believe that the Service should rely on the validity of a consent executed on behalf of a minor who resides in New York by the minor's parents or guardian. Parents are joint guardians of their minor children under New York law. N.Y. Dom. Rel. Law § 81 (Consol. 2001). The general rule in New York is that guardians have no power to make contracts binding upon their wards. Ide v. Brown, 178 N.Y. 26, 31-32 (1904); 66 NY Jur 2d, Infants § 249. For example, an extension of time granted by a minor's mother, who was acting as his guardian, was held not to be binding on the minor. In re Estate of McIntyre, 289 N.Y.S. 10, 15 (1936), modified on other grounds, 292 N.Y.S. 746, aff'd, 275 N.Y. 603 (1937). Under New York law, the general rule is that when guardians contract on behalf of their minor wards, they alone are liable on the contracts. See Nethercott v. Kelly, 5 N.Y.S. 259, 260 (1889).

² At common law, an individual under 21 years old is a minor. Sternlieb v. Normandie National Securities Corp., 263 N.Y. 245 (1934). The New York legislature has enacted a number of laws that provide, for purposes of specific chapters of the law, that persons cease to be minors when they reach 18 years of age. See N.Y. C.P.L.R. § 105(j); N.Y. Dom. Rel. Law § 2 (Consol. 2001); N.Y. Gen. Oblig. Law § 1-202. New York General Obligation Law section 3-101 provides that contracts made after August 31, 1974 by individuals after they have reached 18 years of age may not be disaffirmed by the individuals on the grounds of infancy.

Based on the foregoing, we do not believe that the Service should rely on the validity of a consent executed by or on behalf of a minor who resides in New York.³

This opinion is based on the facts set forth herein. It might change if the facts are determined to be incorrect or if additional facts are developed. If the facts are determined to be incorrect or if additional facts are developed, this opinion should not be relied upon. You should be aware that, under routine procedures that have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary. If we can be of further assistance, you may call the undersigned at (516) 688-1737.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

ROLAND BARRAL
Area Counsel (Financial
Services & Healthcare:Manhattan)

By: _____
HALVOR N. ADAMS III
Senior Attorney

³ The issue of who can sign a settlement agreement on behalf of the minor was not raised in your request and is not addressed herein.